

FEDERAL COURT OF AUSTRALIA

Li v Minister for Immigration & Citizenship [2008] FCA 902

**HUAI XIN LI v MINISTER FOR IMMIGRATION AND CITIZENSHIP and
MIGRATION REVIEW TRIBUNAL
NSD 299 OF 2008**

**JESSUP J
17 JUNE 2008
MELBOURNE (HEARD IN SYDNEY)**

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 299 OF 2008

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: HUAI XIN LI
 Appellant**

**AND: MINISTER FOR IMMIGRATION AND CITIZENSHIP
 First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGE: JESSUP J

DATE OF ORDER: 17 JUNE 2008

WHERE MADE: MELBOURNE (HEARD IN SYDNEY)

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by the Federal Magistrates Court on 15 February 2008 be set aside, and in place thereof it be ordered that:
 - (a) a writ of certiorari issue directed to the Migration Review Tribunal quashing its decision made on 19 June 2007;
 - (b) a writ of mandamus issue directed to the Migration Review Tribunal requiring it to review according to law the decision made by a delegate of the first respondent on 4 April 2006 to refuse to grant a protection visa to the appellant.
3. The first respondent pay the appellant's costs of the appeal.
4. The parties have leave to make such application as they, or either of them, may be advised with respect to the costs of the application in the Federal Magistrates Court, any such application to be made within 14 days.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
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ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **HUAI XIN LI**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
 First Respondent

MIGRATION REVIEW TRIBUNAL
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JUDGE: **JESSUP J**

DATE: **17 JUNE 2008**

PLACE: **MELBOURNE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

1 1 Before the court is an appeal from a judgment of the Federal Magistrates Court of Australia given on 15 February 2008, dismissing an application for writs of certiorari and mandamus, and for a declaration, in relation to a decision of the Migration Review Tribunal (“the Tribunal”) made on 19 June 2007 and handed down on 29 June 2007. In that decision, the Tribunal affirmed an earlier decision of a delegate of the respondent Minister not to grant the appellant a Partner (Migrant) (Class BC) Visa under the *Migration Act 1958* (Cth) (“the Act”).

2 2 According to the findings of the Tribunal, the appellant and her sponsor, Mr Wing Hing Tang, were married on 16 September 2003 in Tianjin, China. The appellant applied for a Partner (Migrant) (Class BC) Visa on 25 November 2003. She was granted a Temporary Visa on 12 August 2004, and she arrived in Australia on 3 September 2004. By a decision made on 4 April 2006 by a delegate of the respondent Minister, the appellant was refused a permanent visa, namely, a Partner (Migrant) (Class BC) Visa. The essence of the reason for this refusal was that the delegate was not satisfied that the appellant and her

sponsor lived together or were in a genuine and continuing relationship. The appellant applied for a review of that refusal and, on 19 June 2007, the Tribunal held that it was not satisfied that the appellant and her sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others, or that their relationship was genuine and continuing. The essence of the appellant's case in the Federal Magistrates Court, and on appeal, was that the Tribunal had constructively failed to exercise its jurisdiction, and that, therefore, mandamus and certiorari should go.

3 3 Under s 29 of the Act, the Minister may grant a non-citizen a visa to travel to and enter, and/or to remain in, Australia. Under s 31 of the Act, there are to be prescribed classes of visas. Under s 65 of the Act, if the Minister is satisfied (*inter alia*) that the criteria prescribed for a particular visa application by the Act or the regulations have been satisfied, he or she is to grant the visa; otherwise, he or she is to refuse to grant the visa. Under Schedule 1 to the *Migration Regulations 1994* (Cth) ("the Regulations"), the Partner (Migrant) (Class BC) Visa is a prescribed class of visa. Subclass 100 (Spouse) is a prescribed sub-class of this class of visa. Relevantly to the circumstances of the appellant, the criteria to be satisfied for the granting to her of a visa in the spouse sub-class are set out in item 100.221 of Schedule 2 to the Regulations. A criterion in that item is that the applicant for the visa be the "spouse" of his or her sponsor.

4 4 In the facts of the present case, the appellant was, of course, the "spouse" of her sponsor, as the word is generally understood. However, the word has a defined sense under the Regulations. That sense is set out in reg 1.15A, as follows:

- (1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:
 - (a) in a married relationship, as described in subregulation (1A);
 - ...
- (1A) Persons are in a married relationship if:
 - (a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and
 - (b) the Minister is satisfied that:
 - (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
 - (ii) the relationship between them is genuine and continuing; and
 - (iii) they:
 - (A) live together; or

- (B) do not live separately and apart on a permanent basis.

...

- (3) In forming an opinion whether 2 persons are in a married relationship ... in relation to an application for:
 - (ad) a Partner (Migrant) (Class BC) visa; ...the Minister must have regard to all of the circumstances of the relationship, including, in particular:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses;
 - (b) the nature of the household, including:
 - (i) any joint responsibility for care and support of children, if any; and
 - (ii) the parties' living arrangements; and
 - (iii) any sharing of responsibility for housework;
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities;
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.

...

- (5) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.

In the case of the appellant, it was her ability to satisfy sub-pars (i) and (ii) of reg 1.15A(1A) (b) which was controversial before the Tribunal. This required the Tribunal to "have regard

to all of the circumstances of the relationship, including, in particular” those set out in pars (a), (b), (c) and (d) of subreg (3) of the regulation.

5 5 The appellant put many factual matters before the Tribunal (and before the delegate earlier) in support of her case under reg 1.15A. Save in one respect to which I shall return, it is not contended on her behalf that the Tribunal did not have regard to those matters in its consideration of the circumstances of the case, as was its obligation under the Regulations. Towards the commencement of that part of its decision which was headed “Findings and Reasons”, the Tribunal said:

The Tribunal is not satisfied that the [appellant] and sponsor have a mutual commitment to a shared life as husband and wife to the exclusion of all others and their relationship is genuine and continuing. The Tribunal makes this finding on the basis of the entirety of the circumstances of the relationship, including the financial and social aspects and the nature of the [appellant's] and sponsor's household and their commitment to each other.

Elaborating upon that conclusion, the Tribunal said that it did not find the appellant to be “a credible witness in key aspects of her oral evidence”. It said that the appellant did not impress it “in responses in giving evidence which was often weak, unconvincing and vague”. The appellant had shown some equivocation in response to the question whether she was studying English full time. She did not provide evidence of joint ownership of real estate or other major assets, or of any joint liabilities, with the sponsor. The Tribunal was not, it seems, convinced by the appellant's explanation for the absence of documentary evidence of the joint undertaking of financial responsibilities. The Tribunal noted that the appellant “provided very limited detail to the Tribunal of a shared social or personal life”. She was unable to provide relevant detail about her husband's employment. The Tribunal noted that the appellant had not taken holidays together with her husband, but that each had travelled overseas independently of the other.

6 6 The Tribunal then referred to the record of a “home visit”, which was carried out by officers of the Department of Immigration and Citizenship in the period leading to the decision by the delegate. The appellant was not at home at this time, and the officers found an almost complete absence of female personal belongings in the sponsor's dwelling. The Tribunal found the appellant's explanation for this circumstance – that she had had a minor dispute with the sponsor, and had moved out temporarily – to be unconvincing. The Tribunal

was not satisfied that the absence of the appellant's personal effects at the dwelling "was simply a temporary circumstance resulting after a dispute".

7 According to the Tribunal, the appellant relied upon three statutory declarations from third parties. Two of these had been from shopkeepers to whom the appellant was known, and one had been from someone the Tribunal described as a neighbour. The Tribunal said that it did not place weight on those declarations, as the persons concerned "are not of sufficient proximity to the [appellant] and sponsor and the content of these statutory declarations merely describes knowing the [appellant] and sponsor".

8 The conclusion of the Tribunal was as follows:

Thus considered collectively the points set out above lead the Tribunal to not be satisfied that at the time of decision the [appellant] and her sponsor have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. They therefore do not satisfy the requirements of rr.1.15A(1A)(b)(i) and 1.15(1A)(b)(ii) for a married relationship.

The Tribunal held, in the circumstances, that it was not satisfied that the appellant was the "spouse" of the sponsor within the meaning of reg 1.15A.

9 Although the appellant relied upon two grounds in her application for certiorari and mandamus in the Federal Magistrates Court, she abandoned one of them upon the hearing of her appeal. The other ground in that court was follows:

The second respondent failed to comply with its obligation to review the decision of the first respondent, in that it failed to consider the [appellant's] claim that she and her sponsor were attempting to have a child together.

In this court, it was contended by the appellant that the Federal Magistrate had erred in finding that the Tribunal was not required specifically to consider and determine the appellant's claim that she and her husband had been actively taking steps to conceive a child. This ground requires me to advert to the material before the Tribunal, to the extent that it relates to the one factual circumstance which, according to the appellant, the Tribunal failed to take into account.

10 In a written statement certified by a notary public in China on 10 November 2003, the appellant explained the circumstances under which she became acquainted with,

and subsequently married, her sponsor. Towards the end of that statement, she said: "Presently, the first thing I hope to do is to give birth to a health [sic] and lovely baby to him". In a letter from the sponsor dated 13 February 2004, he provided the reasons why he was divorced from his two previous wives. In the case of his first wife, she had two sons already "so she did not want to have baby". In the case of his second wife, she suffered from a particular condition which, apparently, made it "very risky to have baby". The sponsor concluded his letter by saying, "I hope [the appellant] can have our kids if she can come as soon as possible." In a statutory declaration made on 3 November 2005, the appellant said (of the sponsor): "I will have a baby for him." In an attachment to that declaration, the appellant set out some detail of her circumstances, and of her relationship with her sponsor, and concluded: "We love each other. I will have a baby for him." In a statutory declaration of the same day, the sponsor said: "Basically I love her and I feel she love me too. The baby is our dream and hopefully will come true really soon." He repeated that statement in an attachment to his statutory declaration, in other respects containing more detail. In a statutory declaration made on 7 May 2007, the sponsor provided further information in support of the appellant's application. Under the heading "future plan", the sponsor said: "Expecting a baby: we use the OvuPlan ovulation prediction kit to find the right time to have baby. We like to have two in case we get old they can help each others [sic]".

11 11 The appellant relied also upon material supplied by third parties. In a statutory declaration made on 2 November 2005, someone who had known the appellant for about 17 years, Ms Jing Xiang Liu (the person described by the Tribunal as a neighbour), referred briefly to the relationship between the appellant and her sponsor, and concluded "[the appellant] has tried hard to have a baby with her husband." A further declaration by the same declarant made on 8 April 2007 contained the statement: "Now [the appellant] asked me how to get pregnancy [sic] for she was want to have baby for themselves." In a statutory declaration made on 5 April 2007, the proprietor of a Chinese herb shop, Mr Guo Hong Zhong, referred to his knowledge of the sponsor from the latter having come to his shop from time to time, both to seek medical advice and to buy Chinese herbs and pills. He said:

Since [the appellant] came to join Mr Tang, Mr Tang always asked me to prepare the herbal tea to increase sexual energy and the pills how to increase sex power. ... Mr Tang not only asked me to prepare the herbal tea for stronger sex energy but also to help to give birth to child. They are trying hard to have baby.

12 The Tribunal referred to the documents which had been provided to it by the appellant in support of her application. They were said to include the declaration by Ms Liu and that by Mr Zhong, but in neither case did the Tribunal note the material in those declarations which tended to indicate that the appellant and sponsor desired to have, and were attempting to have, a baby. In the case of Ms Liu's declaration, the Tribunal noted that "she [Ms Liu] has known the [appellant] for some 21 years and the sponsor for some nine years and ... the [appellant] resided in her home in the Chinese New Year of 2006." In the case of Mr Zhong, the Tribunal noted that "he owns a shop providing Chinese herbal medicines and ... both the [appellant] and sponsor have come to his shop to buy goods and he believes that they had a genuine relationship." These were two of the three declarations upon which the Tribunal did not place weight since, in the view of the Tribunal, the declarants "are not of sufficient proximity to the [appellant] and sponsor and the content of these statutory declarations merely describes knowing the [appellant] and sponsor."

13 The fact that the appellant and the sponsor proposed to have a baby was referred to only twice in the Tribunal's decision, once in its recitation of the evidence given by the appellant at an oral hearing, as follows:

When asked whether they were saving money for any particular future plans she stated that they planned to have a child but that her husband does not earn a huge amount of money so that they have not yet saved any money but that they would eventually like to buy a house. Asked if they were currently saving money to buy a house in the future, she stated "No." Asked again if she knew the current earnings of her husband, she stated that she does not know. She stated that his job is not stable.

The other reference was to the sponsor's statutory declaration of 3 November 2005 in the following terms:

Also provided is statutory declaration by the sponsor in which he states the following:

- He is the breadwinner and his wife is a homemaker
- That they rarely attend social functions because of his work commitments and because they have a limited social network
- He has little savings because money has been spent on overseas trips and the appeal process
- He provides information on his driving instructor business
- He is reluctant to give his wife a credit card as her English is poor
- They hope to have a baby sometime in the future

14 It was submitted on behalf of the appellant in the Federal Magistrates Court that the Tribunal had failed to consider her claim of a wish to have a child with her sponsor. The Federal Magistrate dealt with this submission under two headings, namely “evidence of the herbalist” and “evidence of sponsor”. As to the former, her Honour held that the finding that the herbalist was not a person “of sufficient proximity” to the appellant and the sponsor was open to the Tribunal on the evidence and material before it. Her Honour continued:

However, a fair reading of the Tribunal’s decision makes clear that the Tribunal understood that the [appellant] was providing the herbalist’s evidence as corroborative of her claim of a genuine spousal relationship with the Sponsor. The Tribunal evaluated the evidence of the herbalist. The weight placed on the evidence of the herbalist evidence is a matter for the Tribunal. As referred to above in these Reasons. It was open to the Tribunal to find that the evidence of the herbalist was of little or no weight because of the lack of proximity of the herbalist with the [appellant] and the Sponsor and the limited nature of their relationship.

15 Under the heading “evidence of sponsor”, the Federal Magistrate dealt with the submission that the Tribunal had failed to consider the evidence both of the appellant and of her sponsor about the desire to have a child. Her Honour noted that the Tribunal had discussed with the appellant whether she and the sponsor were saving money for any future plans, and noted her response with respect to her intentions to have a child, and the qualification placed upon that response by reference to lack of money at that stage (as set out in par 13 above). In response to the submission that the Tribunal made no reference to the sponsor’s evidence as to using “OvuPlan”, nor as to his visits to the herbalist and the purpose of those visits, her Honour said:

... a finding by the Tribunal in the terms of the claim made by the [appellant] that she and the Sponsor were trying to have a child would not have been determinative of her application. Regulation 1.15A of the Migration Regulations identifies the criteria to which the Tribunal must have regard in considering the genuineness of a spousal relationship. These matters include the financial aspects of the relationship; the nature of the household; the social aspects of the relationship and the nature of the persons [sic] commitment to each other. The desire to have a child is not a specific criteria [sic] that is required to be addressed by the Tribunal. It is no more than part of the factual matrix upon which the [appellant] relied as evidence of the genuineness of her spousal relationship.

16 The Federal Magistrate noted that the Tribunal had “comprehensively rejected the [appellant’s] evidence about the nature of her relationship with the sponsor”, and had

found the [appellant] “not to be a witness of truth.” In those circumstances, according to her Honour, the Tribunal was not required specifically to reject “each and every piece of evidence given by the [appellant] in support of her claim” or “to consider further the [appellant’s] evidence of her plan with the sponsor to have a child.”

17 17 On appeal, counsel for the appellant submitted that the Federal Magistrate was in error to have characterised the Tribunal’s shortcomings as no more than an omission to refer to particular aspects of the evidence before it. Rather, according to counsel, the Tribunal had failed to turn its mind to the appellant’s claims as such, or to the component integers of her case, in such a way as constituted a constructive failure to exercise jurisdiction. In this respect counsel relied upon the line of jurisprudence which is perhaps best encapsulated in *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244, 259. See also *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389, 394-395.

18 18 Counsel for the Minister submitted that the Federal Magistrate was correct to observe that the matter of an intention to have a baby, or a couple’s active endeavours in that regard, were not circumstances referred to in reg 1.15A to which the Tribunal was obliged to have regard. They were no more, she submitted, than elements of the evidentiary case upon which the appellant chose to rely. Counsel pointed to the paragraph in the Tribunal’s decision which I have set out in par 5 above, and submitted that that paragraph should be taken at face value, that is, as indicating that the Tribunal had had regard to “the entirety of the circumstances of the relationship”. The fact that the Tribunal did not advert to each piece of evidence upon which the appellant had relied was not, counsel submitted, a jurisdictional deficiency in the way the Tribunal had undertaken its task.

19 19 *Htun* involved an application for a visa in reliance upon what was claimed to be a well-founded fear of persecution with the meaning of the Refugees Convention. The appellant in that case had, in his application before the Refugee Review Tribunal, relied upon a number of circumstances, one of which was that he had friends who were members of the Karen National Liberation Army. Giving a judgment which attracted the assent of Spender J, Allsop J said (194 ALR at 259 [42]):

The “participation in the Karen community and the political groups” could be

said to have been dealt with by the tribunal dealing with the appellant's activities in Australia. The friendships (of the appellant, as a Karen) with people in organisations such as the KNLA were not. This is not merely one aspect of evidence not being touched. It is not a failure to find a “relevant” fact. The tribunal failed to address and deal with how the claim was put to it, at least in part. The requirement to review the decision under s 414 of the Act requires the tribunal to consider the claims of the applicant. To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on. The claim or claims and its or their component integers are considerations made mandatorily relevant by the Act for consideration in the sense discussed in *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24; 66 ALR 299 and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; 180 ALR 1; 62 ALD 225. See also *Sellamuthu v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 287; 58 ALD 30 at [18], [19], [21] and [50]. It is to be distinguished from errant fact finding. The nature and extent of the task of the tribunal revealed by the terms of the Act, for example ss 54, 57, 65, 414, 415, 423, 424, 425, 427 and 428 and the express reference in reg 866 to the “claims” of the applicant for example 866.211, make it clear that the tribunal's statutorily required task is to examine and deal with the claims for asylum made by the applicant. If there is a sur place claim made in addition to a claim based on conduct or experiences elsewhere both must be dealt with. If the sur place claim is, or is to be seen as, based on more than one foundation — that is, what has been done by way of political activity and also because of friendships made with other Karen people of arguably seriously subversive background, both bases of the claim must be dealt with. The tribunal did not deal with the latter basis of the appellant's sur place claim based on imputed political opinion. It was not a failure merely to attend to evidence, even probative evidence, and by such route commit a factual error. It was a failure to deal with one part of the claim for asylum on the basis of his imputed political opinion. It is true that when called on at the hearing to articulate orally his fears he did not expressly identify his friendships as distinct from his activities in Australia. However, given the clarity of the expression of this fear in his application for review and the existence of objective material put forward by him to support it, I do not see this basis for the claim as having been abandoned. Conceptually, and in a common sense way, it was quite distinct from his claim based on his activities of the kind referred to earlier.

20 20 *Dranichnikov* was also a case in which status as a refugee under the Refugees Convention was relied upon to ground an application for a visa. The applicant in that case had asserted that he was a member of a particular social group constituted by entrepreneurs and businessmen in Russia who publicly criticised law enforcement authorities for failing to take action against crime or criminals. The Refugee Review Tribunal had disposed of the application adversely to the applicant upon the basis that businessmen in Russia were not a particular social group upon which the applicant could rely. In a judgment with which Hayne J relevantly agreed, Gummow and Callinan said (197 ALR at 394-395 [26]-[27]):

At the outset it should be pointed out that the task of the tribunal involves a number of steps. First the tribunal needs to determine whether the group or class to which an applicant claims to belong is capable of constituting a social group for the purposes of the Convention. That determination in part at least involves a question of law. If that question is answered affirmatively, the next question, one of fact, is whether the applicant is a member of that class. There then follow the questions whether the applicant has a fear, whether the fear is well-founded, and if it is, whether it is for a Convention reason.

The tribunal failed to decide the first question. It decided another question, whether Mr Dranichnikov's membership of a social group, namely, of "businessmen in Russia" was a reason for his persecution and relevantly nothing more. The tribunal should have decided the matter which was put to it, whether Mr Dranichnikov was a member of a social group consisting of entrepreneurs and businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals.

21 21 A question which arises in the present appeal is whether the assertion by the appellant that she and her sponsor were proposing, and were attempting, to have a baby was a definitional element of the very question which the delegate, and later the Tribunal, were required to decide, in the sense which brought the case within the authority of *Htun* and *Dranichnikov*. In this respect it is, in my view, important to note the statutory framework within which protection visas (ie visas which acknowledge a fear of persecution of the kind referred to in the Refugees Convention) are granted, and how that framework differs from that applicable to visas of the kind with which the present appeal is concerned.

22 22 A protection visa is not a prescribed class of visa, but is a class referred to in s 31(2), and in s 36, of the Act itself. A criterion for the grant of a protection visa is set out in s 36(2), namely (in the case of someone who is directly involved, rather than as the spouse or a dependant of such a person), that the applicant be a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention. Under reg 866.211 of the Regulations, there are also criteria that the applicant *claims* to be a person to whom Australia has protection obligations under the Convention and that the applicant makes *specific claims* under the Convention. In the case of an application for a protection visa, therefore, the claims which the applicant actually makes constitute the definitional elements of the application. As is clear from cases such as *Htun* and *Dranichnikov*, the courts have regarded such claims as more than merely pieces of evidence in support of a contention that there exists a fear of one of the kinds referred to in the

Convention. They have been regarded, it seems, as definitional with respect to the very question which comes before the relevant decision-maker.

23 23 By contrast, at least relevantly to the present case, the entitlement of an applicant to a spouse visa is not structured around the nature of the claims which he or she makes. The elements of an applicant's case, as it were, are the components of the definition of "spouse" in reg 1.15A. Undoubtedly the decision-maker is required to consider each of those components, and it is not suggested in the present case that the Tribunal did not do so. The matters which must be considered are stated objectively and, in some respects, broadly. It is inevitable that, under these broad categories, the decision-maker will base his or her decision upon evidence. Such evidence, however, whether advanced by the applicant or obtained otherwise, is not, in my view, of the same legal nature as the "claims", made by an applicant for a protection visa, by reference to which the decision whether to grant a visa of the latter kind must be made.

24 24 However, there is another way in which the submissions made on behalf of the appellant should be understood, namely, as contending that the Tribunal failed to comply with the command in reg 1.15A(3) to have regard to "all of the circumstances of the case". Unavoidably, as it appears to me, this requirement carried with it the obligation to identify what those circumstances were. It is at this point, in my view, that the Tribunal's treatment of the appellant's case fell short of what was required. The Tribunal noted that both the appellant and her sponsor had stated their intention to have a baby, but it made no finding as to whether it accepted their evidence in that regard. It might have rejected that evidence, thereby effectively finding that they did not intend to have a baby. Or it might have accepted the evidence, but held that, notwithstanding that intention, the overall balance of circumstances did not support a finding that the appellant was her sponsor's spouse within the meaning of reg 1.15A. Yet again, it might have noted the evidence and, without making findings one way or the other, ruled that whether or not the evidence was accepted would make no difference to its conclusion under the regulation.

25 25 But the Tribunal adopted none of those courses. It noted the evidence, and expressed quite serious reservations as to some aspects of the evidence of the appellant and her sponsor. But the Tribunal did not go to the extent of saying that everything the appellant

and her sponsor said was a fabrication. Thus it said only that the appellant was found not to be a credible witness on “key” aspects of her “oral” evidence. It said that the appellant and her sponsor “provided very limited detail” of a shared social or personal life. It said that it found the appellant’s evidence as to the reason for her absence from the sponsor’s dwelling at the time of the home visit “unconvincing”. It said that it did not “place weight on” the statutory declarations of the third parties because they were not of sufficient proximity to the appellant and her sponsor. But it said nothing about whether its reservations applied to the evidence about the intention to have a baby. A reader of the Tribunal’s decision does not know whether the evidence was rejected; or whether it was accepted in point of fact but considered to be of insufficient weight to affect the final conclusion. In the nature of things, the latter seems a very unlikely possibility, but it is not for the court to opine on the matter one way or the other. It is sufficient that the joint intention to have a baby was something which the appellant put forward in support of her application. It was, I consider, incumbent upon the Tribunal to decide for itself whether that intention existed as a fact (or clearly to dismiss it as inconsequential) for the purpose of including it within, or excluding it from, the “circumstances” to which the Tribunal would then have regard under reg 1.15A(3).

26 26 In the passage which I have set out in par 5 above, the Tribunal said that it had made its finding “on the basis of the entirety of the circumstances of the relationship”. The difficulty with this statement is that it does not reveal what the circumstances were. Normally, that would not be a problem. I would see no problem in the Tribunal setting out all of the factual elements of an applicant’s case, making it clear that it accepted them all (or some of them as the case required) as circumstances for the purposes of reg 1.15A(3), and then stating that it had taken them all into account and arriving at a particular conclusion. So it is not the omnibus nature of the statement that concerns me. My concern arises from the fact that the Tribunal here appears to have glossed over, as it were, the intermediate stage. That is an important stage, because it links what is otherwise just a miscellany of information to the statutory criteria.

27 27 Because of the terms of s 368(1)(c) of the Act – which required the Tribunal to include in its written decision “the findings on any material questions of fact” – it must be assumed that, to the extent that the Tribunal made material findings in the present case, it set them out in its decision. It is not, therefore, possible to assume that the Tribunal must

obviously, albeit silently, have rejected the evidence of the appellant and her sponsor as to their intention to have a baby. Neither was that evidence clearly accepted. As mentioned above, I consider that the obligation to identify the circumstances by reference to which the Tribunal makes its decision under reg 1.15A is implicit in the way sub-reg (3) is expressed. For reasons expressed above, I consider that the Tribunal failed to discharge that obligation in the present case.

28 Returning to the reasons of the Federal Magistrate, it does seem, with respect, that her Honour did not appreciate the significance of the way the decision-maker's obligation was expressed in reg 1.15A(3) as referred to above. Perhaps that is because the case for the appellant was put to her more as involving an allegation that the Tribunal failed to have regard to relevant considerations: see *Craig v State of South Australia* (1995) 184 CLR 163, 177 and *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24, 39-41. Thus her Honour noted that the desire to have a child was not a specific criterion referred to in reg 1.15A. However, as I have attempted to explain, the Tribunal's error was more fundamental than failing to have regard to a relevant consideration: it did not make the findings of fact required to discharge its obligation under reg 1.15A to have regard to all of the circumstances of the relationship. With respect to her Honour, I also take the view that to regard the appellant's desire to have a child as "no more than part of the factual matrix upon which the [appellant] relied" as to genuineness was to beg, or perhaps to sidestep, the question. Her Honour here assumed that the Tribunal had found that such a desire was indeed part of the "factual matrix". It had not done so. Neither do I agree with her Honour that the Tribunal "comprehensively rejected the [appellant's] evidence" or that it found the appellant "not to be a witness of truth". In this respect also, her Honour seems, with respect, to have decided the case by reference to assumed findings on credibility which were more categorical, and more universal, than those actually made by the Tribunal. Indeed, it is the very qualified, and at times equivocal, nature of the Tribunal's findings on credibility that makes it impossible to conclude that the Tribunal must necessarily, but silently, have rejected the appellant's evidence in relevant respects.

29 For the above reasons, the appeal will be allowed, and the appellant will be granted writs of certiorari and mandamus as sought in the Federal Magistrates Court.

I certify that the preceding twenty-

nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup.

Associate:

Dated: 17 June 2008

Counsel for the Appellant:	Mr N Poynder
Solicitor for the Appellant:	Austin Haworth & Lexon Legal
Counsel for the Respondents:	Ms J Gleeson
Solicitor for the Respondents:	Sparke Helmore
Date of Hearing:	23 May 2008
Date of Judgment:	17 June 2008